IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6912

EDGAR GILBERT MILLER PETITIONER

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S MEMORANDUM IN OPPOSITION

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EDGAR GILBERT MILLER — PETITIONER

V. — ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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MAY IT PLEASE THE COURT:

OPINIONS BELOW

As set out in petitioner's Petition and attached thereto.

JURISDICTION

Jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

I.

WHETHER UNDER THE FACTS OF THIS CASE PETITIONER WAS ENTITLED TO AN INSTRUCTION AT TRIAL ON THE PRESUMPTION OF INNOCENCE.

II.

WHETHER TAYLOR V. KENTUCKY (No. 77-5549, DECIDED MAY 30, 1978) SHOULD BE APPLIED RETROACTIVELY SO AS TO AFFECT THIS CASE.

CONSTITUTIONAL ISSUES INVOLVED (ASSERTED)

The Constitutional issues asserted by petitioner are the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Petitioner was tried and convicted of First Degree Robbery (Kentucky Revised States, hereinafter KRS), (KRS 515.020(1)), and First Degree Assault (KRS 508.010(1)(a)) and sentenced to twenty (20) years imprisonment on each charge to be served concurrently, in the Warren (Bowling Green) Circuit Court. On appeal to the Kentucky Supreme Court, the conviction of First Degree Robbery was affirmed and the conviction of First Degree Assault was reversed on the ground that all of the elements of assault were merged into the elements of First Degree Robbery in accordance with the Kentucky Supreme Court's previous opinion in Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977). Petitioner, at trial and on appeal, asserted as one of eight grounds for reversal that he was entitled to an offered instruction of presumption of innocence. This issue was decided adversely to petitioner's assertion without comment, the Kentucky Supreme Court citing Taylor v. Commonwealth, Ky.App., 551 S.W.2d 813; Discretionary Review denied June 29, 1977, Cert. granted November 28, 1977).

At trial, an extensive voir dire was conducted in which defense counsel queried the prospective jurors on the presumption of innocence (TE 35-37, Appendix A). Counsel also discussed the concept in his opening statement (TE 165-166, Appendix B) and in closing argument (TE 214-219, Appendix C).

Mona Miller (no relation to petitioner) testified (TE 70-115, Appendix D), that she was a secretary for the Sheet Metal Workers and did all the union's office work and that petitioner came into her office on December 6, 1976 while she was washing the coffee pot in a bathroom. Sensing someone behind her, she turned and saw petitioner with a gun pointing at her stomach. He was wearing a hat, expensive looking sunglasses, a little Hitler-type mustache and had on a tan coat. The mustache appeared to be false. She screamed and he began to beat her with the gun about her head and hands. He required her to open the safe to give him a money bag containing money and checks. She recognized him instantly as a man who had come into the union office on two previous occasions.

She remembered him because he had the same surname as hers and lived on the same rural route number, he filled out an application form on one of those occasions, and she had followed him on the one previous occasion, behind his Cadillac, which contained a bumper sticker which made uncomplimentary statements about someone's wife. Mrs. Miller's beating resulted in her hospitalization for ten days. Introduced were her wedding band which contained a dent in it and her watch. Mrs. Miller's husband testified to her condition when he arrived after being called. A police officer testified as to her condition when he arrived. Petitioner testified he went to Nashville, Tennessee that day and did not return until after dark, about 6 P.M. Mike Caudill, however, testified he was in Caudill's store both in the morning between 8 - 9 A.M. and again between 4 - 5 P.M. In the morning, petitioner purchased items on credit but paid Caudill back that afternoon. Ten witnesses testified for the prosecution. Petitioner was the only defense witness.

ARGUMENT

I.

THE DECISION IN TAYLOR V. KENTUCKY (77-5549, DECIDED MAY 30, 1978) DOES NOT AUTHORIZE UNDER THE FACTS OF THIS CASE THE GRANTING OF A WRIT OF CERTIORARI.

Petitioner contends that Taylor v. Kentucky, supra, mandates the granting of a writ of certiorari because the trial court refused to give his proffered instruction on the presumption of innocence and thus such failure violated his right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

Respondent submits that certiorari should be denied and that

Taylor is not dispositive of the issue in this case.

In Taylor, only two witnesses testified -- the prosecuting witness and the defendant. The result was, in effect, a swearing contest as to who was telling the truth. Here, although the only witnesses to see the robbery were the victim and petitioner (although he denied his participation), there was other corroborating evidence. The victim's husband described her beaten condition. So did the police officer. The victim's ring was damaged in the beating of her hands by the petitioner with his pistol. The victim was hospitalized ten days with serious injuries. Another witness testified that he saw petitioner in his store at 4 P.M. on the day petitioner testified he did not get back from Nashville until after dark, after the news came on at 6 P.M. Another witness, a police officer, found blood over the bathroom floor and commode. Another witness testified he took petitioner to Nashville on the date of the robbery but not until that night -- after the robbery. An expert witness testified that the signature card filled out by petitioner on his previous appearance in the union office was, in fact, petitioner's signature.

So, the proof in this case is not that of a swearing contest between only two opposing witnesses, but a mass of evidence which corroborates the description of petitioner as the robber and nullifies his alibi defense.

As we read and understand Taylor, this Court stated in its majority opinion (Slip Opinion, p. 12):

> "We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." (Emphasis supplied)

Mr. Justice Brennan in his concurring opinion in Taylor

believed that trial judges in all criminal cases should give the presumption of innocence instruction where it is requested, and Mr. Justice Stevens in his dissenting opinion observed that:

> "In some cases the omission [to give the offered instruction] may be fatal, but the Court wisely avoids a holding that this is always so." (Slip Opinion, dissent p. 2) (Emphasis supplied)

Respondent submits that this is one of the cases in which Taylor should not apply.

Whereas, in Taylor, this Court faulted the prosecutor's inferences of guilt from "facts" not in evidence, no similar situation appears in this case.

In Taylor, only two witnesses testified and the evidence was not so substantial as to guilt. On that basis, this Court believed that the requested instruction as to presumption of innocence was an added safeguard for the preservation of due process.

Here, there is an abundance of evidence of guilt. More than ten prosecution witnesses testified. There was corroborative evidence to support the primary prosecution witness' testimony. The giving or failing to give the instruction would not have changed the course of the trial and the resultant jury verdict. And, this case arose before this Court's decision in Taylor.

II.

TAYLOR V. KENTUCKY SHOULD NOT BE GIVEN RETROACTIVE APPLICATION.

The respondent submits that Taylor v. Kentucky, supra, should not be given retroactive effect to this case which was decided before Taylor. In fact, Taylor is not totally prospective in application because it is limited to cases of similar fact situations.

A new rule should not be given retroactive application if its effect will impose an undue burden on the administration of justice. Linkletter v. Walker (1965), 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731, nor should it be applied if it will have a grave effect on several states which had in reliance on earlier decisions been following a contrary rule. This Court held in Tehan v. United States (1966) 383 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459, rehearing denied 383 U.S. 931, 15 L.Ed.2d 850, 86 S.Ct. 925 that the rule prohibiting comments on an accused's failure to testify was not entitled to retroactive effect.

Kentucky has for more than fifty years (Mink v. Commonwealth, 228 Ky. 674, 15 S.W.2d 463 (1926)), determined that it was unnecessary for the trial judge to instruct on the presumption of innocence. Undoubtedly, many other states have adopted a similar rule. To apply the rule announced in Taylor retroactively to all those states and cases in which Taylor could be applicable would impose an undue burden on the administration of justice in those states which had relied on a rule which was followed for an extensive number of years. And, to require retroactive application from the fountainhead of a case which in itself is not totally prospective is to apply such application inconsistently.

Thus, it is submitted that because the facts in this case are unlike those in Taylor, Taylor should not apply, and the rule announced in Taylor should only be applied prospectively to those cases tried after Taylor was decided.

CONCLUSION

For the aforesaid stated reasons, respondent submits that the Court should deny certiorari in this case.

Respectfully submitted,

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